SUPREME COURT, U.S.
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Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 1013.

EDWARD KROCK,
Petitioner,

v.

ELECTRIC MOTOR & REPAIR COMPANY, INC.,
Respondent.

BRIEF FOR ELECTRIC MOTOR & REPAIR COMPANY, INC., RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ROBERT GOLDBERG & SON, INC., LAW PRINTERS, BOSTON.

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Statement of the Case.

The petitioner presents a question directed solely to obtaining a ruling on damages; which, admittedly, he did not raise at the trial. (Pet. 2). Here, as in the Court of Appeals, he seeks to achieve a review of whether or not loss of profits is an appropriate measure of damages for his wilful breaches of a sales contract (Pet. 9).

This is a diversity case for damages resulting to Electric[1] from Krock's breaches of a written agreement to sell

[1] For convenience we shall refer to the petitioner as "Krock" and to the respondent as "Electric."

and deliver a quantity of *40*-cycle electric motors (R. 355). The purchase and sale agreement (called the "original contract") is dated September 30, 1955 (Ex. 12B; R. 343). Electric was engaged in the specialized business of buying motors, rebuilding them, and converting them into *60*-cycle for resale (R. 82, 164, 268, 269); a fact known to Krock when the original contract was made (R. 16, 20, 23). 40-cycle motors are unique and unusable in industry, with no available market (R. 60, 63, 64, 267); but they can be resold at a profit if converted into 60-cycle (R. 164, 165), which is standard throughout the United States (R. 63, 164, 267). Electric had resold these motors as 60-cycle (R. 122, 123, 166, 206, 222), anticipating that it would convert and rebuild them. But Krock's refusal to deliver the motors defeated Electric's resales, and deprived Electric of its profits on the resales (R. 132, 145, 146, 162, 163). The jury's verdict compensates Electric for its losses resulting from Krock's defaults.

At the trial, as is apparent from the 362-page printed record, Krock made no denial of his breaches, but relied for his defense solely on a subsequent contract, dated May 3, 1956 (Ex. 2; R. 23), which he claimed to be an accord and satisfaction (R. 165, 173, 218, 219, 315-322, 362). Krock never performed his obligations under this subsequent agreement either (Ex. 34; R. 175, 145, 146, 163). The Court of Appeals reviewed Krock's defense of accord and satisfaction and found it to be without merit (Pet. 10-11; 327 F. 2d 213, 216).

Krock never raised the issue of the measure of damages at the trial. This was an afterthought which he raised, for the first time, in the Court of Appeals. The quotation from page 195 of the record contained on page 3 of the petition is taken out of context (R. 165). At the trial Krock objected to the introduction of evidence of lost profits solely

on the ground that the subsequent contract of May 3, 1956, discharged the original contract of September 30, 1955 (R. 165; 327 F. 2d 213, 216). "This was precisely the stated basis of his continuing objection to the evidence of lost profits" (Pet. 10; 327 F. 2d 213, 216). "Defendant had ample opportunities to make his damage point, but failed to take any" (Pet. 13; 327 F. 2d 213, 217). The petitioner admits that the question "of lost profits [was] not raised specifically on trial" (Pet. 2). He presents it here, as in the Court of Appeals, as an afterthought in an endeavor to cut the amount of his damages, admitting that he owes something, but hoping to pay less (Pet. 5). And he invokes a departure from the usual course of federal judicial proceedings. Federal Rules of Civil Procedure, Rule 46.

Argument.

The petitioner here presents a question the thrust of which is intended solely to achieve for him a reduction in damages. He admits his liability (Pet. 5), but prefers not to pay the $81,920 assessed by the jury (Pet. 5). He wants that amount reduced (Pet. 5). There is nothing in this case of any interest or significance to anybody other than the parties.

There is in this case no question of any public importance (cp. *United States* v. *Union Pacific Railroad Co.*, 353 U.S. 112, 113); no conflict between the Courts of Appeals (cp. *Rogers* v. *Quan*, 357 U.S. 193, 194); no question of federal-state relations (cp. *Leiter Minerals, Inc.*, v. *United States*, 352 U.S. 220); no question involving the federal Constitution (cp. *Rosenberg* v. *Fleuti*, 374 U.S. 449). There is in this case no novel question of law; no conflict with any decision of the Supreme Court; no conflict with applicable state law; and no conflict with federal law.

There is nothing in this petition which presents any question which might be considered exceptional; and there are no impelling circumstances in the case to warrant a review of a question not raised in the trial court. The sole question presented, whether or not the measure of damages, under Massachusetts law[2] should be reviewed, would involve a searching of the entire record for specifics and the piecing together of the voluminous testimony and exhibits. And the result of such a review, requiring an appraisal of the evidence, would be of no interest to anyone other than the litigants. There are in this case no "special or important reasons" to warrant the granting of the writ (Revised Rules of the Supreme Court, Rule 19, 1).

The petitioner advances a plea for what he pleases to call "absolute justice" (Pet. 4). "The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co.* v. *Coty*, 262 U.S. 159, 163. "Nor does it sit for the benefit of the particular litigants." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74. Here the petitioner wants to test the state law of damages, a subject which does not warrant a review on certiorari except in exceptional circumstances which do not exist in this case (cp. *Wolf* v. *Weinstein*, 372 U.S. 633, 636; *Huddleston* v. *Dwyer*, 322 U.S. 232, 237).

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[2] The state law of Massachusetts on recovery for loss of profit is perfectly clear and settled. *Charles Street Garage Co.* v. *Kaplan*, 312 Mass. 624. *Speirs* v. *Union Drop Forge Co.*, 180 Mass. 87, 90. *Parker* v. *Shagholian & Co., Inc.*, 244 Mass. 19, 21. *J. H. Horne & Sons, Co.* v. *Bath Fibre Co., Inc.* (C.A. 1), 272 F. 2d 8.

Conclusion.

There is nothing in this case which warrants the time or attention of the Supreme Court of the United States. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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